MALAYAN BANKING BHD. & ANOR.

v.

SWASTA JAYA SDN. BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-315-1989]
10 FEBRUARY 1990

CIVIL PROCEDURE: *Setting aside Judgment in default of appearance in the High Court - Rules of the High Court 1980, O. 2 - Legal Profession (Practice & Etiquette) Rules 1978 r. 56 - Whether failure to follow procedure is fatal in a case.*

The Sabah Development Bank. Bhd., (1st defendant) and the appellant (2nd and 3rd defendants) agreed to lend the respondents (plaintiffs) a total sum of RM9.5 million as set out in an agreement dated 5 July 1984. The plaintiffs alleged that the defendant was in breach of the agreement and sued them.

The writ was served on the defendants on 14 April 1989. The 3rd defendant entered appearance on 17 June 1989, while 1st and 2nd defendant entered appearance on 21 June 1989 which was a Saturday. On 19 June 1989, the defendants' solicitors sent a copy of the memorandum of appearance dated 17 June 1989 to the plaintiffs' solicitors in Ipoh. On 21 June 1989 they sent another copy of the memorandum of appearance dated 20 June 1989 to the plaintiffs's solicitors in Ipoh. They did not send the stamped copy on the same day as they were unable to obtain the stamped copy on the same day.

According to the plaintiffs they made a search on 22 June 1989 and no memorandum of appearance was found. So, on that day, they obtained two judgments in default of appearance each for the sum of RM14,250,000 against the 2nd and 3rd defendants. On 27 June 1989 the plaintiffs started execution proceedings against the 2nd and 3rd defendants. By summons-in-chambers dated 27 June 1989 the defendants applied to have the judgment in default of appearance and the execution proceedings set aside. Earlier that day, Anuar J granted an interim stay of execution and directed that the said summons-in-chambers be disposed of by the Senior Assistant Registrar on an *inter parte* basis. It was heard by the SAR on 5 June 1989. She set aside the judgment in default of appearance against the 2nd and 3rd defendants and gave them 14 days to file their defence.

The plaintiffs appealed. On 21 August 1989, Anuar J allowed the appeal and set aside the order made by the SAR on 5 July 1989. Hence the appeal before this Court now.

It was conceded by the Counsel for the defendants, Mr. Putucheary that they did not send the copy of appearance on the same day as they did not get the stamped copy back on the same day. They got the stamped copy after the judgment was entered.

The Judge held that failure to serve the stamped copy of the appearance on the plaintiffs was fatal and therefore the judgments dated 22 June 1989 were entered regularly. He considered that the defendants by filing the summons-in-chambers dated 27 June 1989, after being aware of the judgments in default of appearance, had taken a fresh step in the proceedings and therefore could not rely on O. 2 of the Rules of the High Court 1980 ("RHC").

The defendants submitted that the Judge should have rectified the matter instead of saying that the defendants had taken a fresh step after being aware of the irregularity which amounted to a waiver.

Held:

[1] The fact that the defendants applied to have the judgments set aside cannot be said to be taking a fresh step. The reference must be the other side who has taken a fresh step to make any sense.

[2] The affidavit of service does not state the day of the week of service and the capacity of the person served and has therefore not complied with O. 10 r. 1(4) of the Rules of High Court.

[3] The 48 hour rule propounded under r. 56 of the Legal Profession (Practice & Etiquette) Rules 1978 whereby a lawyer has to give 48 hours notice to the lawyer representing the other party is binding among legal practitioners. The plaintiffs alleged that they could not give 48 hours notice as no appearance had been entered and they did not know who was on the other side. But the defendants claimed that if the rules were not complied with, then judgment could not be regular.

[4] As the appeal is concerned with a question of law there is no need to have evidence. The Judge cited a number of cases in his judgment, but the argument was not in *pari materia* with the case concerned.

[5] In *Evans v. Bartlam*, it is clearly stated that while the Court of Appeal will normally not interfere except on grounds of law with the exercise of the Judge's discretion, if it is seen that on other grounds his decision would result in injustice being done, the Court of Appeal has both the power and the duty to remedy it. As Lord Atkin pointed out at p. 480:

> ... The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

[6] The appearance dated 17 June 1989 has the official stamp as having been received on that date at 2.00 p.m. and another stamp as having been received on 27 June 1989 at 9.00 a.m. The appearance dated 20 June 1989 has the official stamp as having been received on that date at 2.00 p.m. and also another stamp at the bottom as having been received on 27 June 1989. These irregularities can only be answered by the Registry and whoever was in charge of the stamp would have to explain the irregularities. Mr. Chelliah, Counsel for the plaintiffs also pointed out that 17 June 1989 was a Saturday and nothing could be done at 2.00 p.m.

[7] This Court is very disturbed to these incidents. In particular, this Court would like to know why appearance were not entered in the cause book.

[8] If the Registry did not comply with the standing practice of handing back the stamped copy of the appearance on the same day, how would it be possible for the defendants to send it to the plaintiffs on the same day? If the Registry had registered the appearances in the cause book, then the plaintiffs would not have been able to obtain the certificates of non-appearance. The Judge considered that the defendants should have written to the plaintiffs' solicitors to inform them of the nature of the delay and extended a copy to the High Court Registry. The defendants did their best by sending a copy of the appearance which would have put the plaintiffs on the alert.

[9] The fact that the defendants were at fault does not necessarily mean that they must be penalised at all cost, particularly when the Registry was, as much, if not more, to blame.

[10] In the light of the irregularities this Court could not agree with the Judge that the judgments were obtained regularly as appearances were clearly entered and should have been registered by the Registry. As this Court considered that an injustice had been done, it ought to remedy it. Accordingly this Court allowed the appeal with costs both here and the Court below. This Court sets aside the judgment of the Judge and restore the order made by the SAR. This Court also orders that the case be heard by another Judge.

[Appeal allowed with costs.]

Cases referred to:
Smith v. Dobbin [1877] 3 Ex D 388
Tan Ting Kok v. Cheong Lep Keen & Anor. [1969] 1 MLJ 153
Cheah Teong Tat v. Ho Gee Seng & Ors. [1975] 2 MLJ 149
Evans v. Bartlam [1937] AC 473
Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd. [1986] 1 MLJ 348
Taman Pangkor v. Doric Development Sdn. Bhd. & Ors. [1987] CLJ (Rep) 1008
Syarikat Joo Seng & Anor. v. Habib Bank Ltd. [1986] 2 MLJ 129
Metroinvest Anstalt & Ors. v. Commercial Union Assurance Co. plc [1985] 2 All ER 318

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1(1), O. 2 r. 2(1), O. 10 r. 1(4), O. 11 r. 5, O. 12 r. 1, O. 12 r. 3(2), O. 13 r. 6

For the respondents - R.R. Chelliah (S.A. Lingam, A. Mahendran, K.Y. Leong with him); M/s. Mahendran & Co.
For the appellants - J.J. Putucheary (D.P. Naban with him); M/s. Skrine & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We allowed the appeal and stated we would give our reasons later. We do so now.

The Sabah Development Bank Bhd., (1st defendant) and the appellants (2nd and 3rd defendants) agreed to lend the respondents (plaintiffs) a total aggregate principal sum of RM9.5 million for a housing project upon terms and conditions as set out in an agreement entered into by the parties on 5 July 1984. The plaintiffs alleged that the defendants were in breach of the agreement and sued them. The writ was served on the defendants on 14 April 1989. The 3rd defendant entered appearance on 17 June 1989 while the 1st and 2nd defendants on 21 June 1989 which was a Saturday. On 19 June 1989 the defendants' solicitors sent a copy of the memorandum of appearance dated 17 June 1989 to the plaintiffs' solicitors in Ipoh. On 21 June 1989 they sent another copy of the memorandum of appearance dated 20 June 1989 to plaintiffs' solicitors in Ipoh. They did not send the stamped copy on the same day as they did not get back the stamped copy on the same day.

According to the plaintiffs they made a search on 22 June 1989 and no memorandum of appearance was found. So, on that day they obtained two certificates of non-appearance against the 2nd and the 3rd defendants. Also, on that day they obtained two judgments in default of appearance each for the sum of RM14,250,000 against the 2nd and the 3rd defendants. On 27 June 1989 the plaintiff started execution proceedings against the 2nd and the 3rd defendants. By summons-in-chambers dated 27 June 1989 the defendants applied to have the judgment in default of appearance and the execution proceedings set aside. Earlier

that day Anuar J granted an interim stay of execution and directed that the said summons-in-chambers be disposed of by the Senior Assistant Registrar on an *inter parte* basis. It was heard by the Senior Assistant Registrar on 5 July 1989 and she set aside the judgment in default of appearance against the 2nd and the 3rd defendants and gave them fourteen days to file their defence. The plaintiffs appealed. On 21 August 1989 Anuar J allowed the appeal and set aside the order made by the Senior Assistant Registrar on 5 July 1989. Hence the appeal before us.

Encik J.J. Putucheary for the defendants conceded that they did not send the copy of the memorandum of appearance on the same day. He explained that they did not get the stamped copy back on the same day so they could not post if the same day. They got the stamped copy after the judgment was entered. So that it was impossible to comply with O. 12 r. 3 of the Rules of the High Court 1980. His contention is that there is a distinction between entering and serving and that under O. 2 r. 2(1) non-compliance with the rules would be curable. Non-compliance of service can be remedied but would not renegade appearance.

The relevant provisions of O. 2 of the Rules of the High Court 1980 provides:

> *O. 2 r. 1(1)*
> Where, in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

> *O. 2 r. 2(1)*
> An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

The learned Judge took the view that the failure to serve the stamped copy of the memorandum of appearance on the plaintiffs was fatal and therefore the judgments dated 22 June 1989 were entered regularly. He considered that the defendants by filing the summons-in-chambers dated 27 June 1989, after being aware of the judgments in default of appearance, had taken a fresh step in the proceedings and therefore could not rely on O. 2.

The defendants submitted that the learned Judge should have rectified the matter instead of saying that the defendants had taken a fresh step after being aware of the irregularity which amounted to a waiver. The fact that the defendants applied to have the judgments set aside cannot be said to be taking a fresh step. The reference must be the other side who has taken a fresh step to make any sense. It was submitted that as the plaintiffs obtained judgments in default of appearance without jurisdiction the defendants were entitled to have the judgments set aside as appearances had in fact been entered. Further, the affidavit of service does not state the day of the week of service and the capacity of the person served and has therefore not complied with O. 10 r. 1(4) of the Rules of the High Court 1980 which reads:

> Where a writ is duly served on a defendant otherwise than by virtue of para. (2) or (3), then, subject to O. 11, r. 5, unless after service the person serving it indorses on it the following particulars, that is to say, the day of the week and date on which it was served, where it was served, the person on whom it was served, and, where he is not the defendant, the capacity in which he was served, the plaintiff in the action begun by the writ shall not be entitled to enter final or interlocutory judgment against the defendant in default of appearance or in default of defence, unless the Court otherwise orders.

Once these are properly endorsed the plaintiffs are entitled to obtain summary judgment without permission of the Court.

Encik R.R. Chelliah for the plaintiffs submitted that non-compliance of O. 12 r. 3(2) was fatal. He cited *Smith v. Dobbin* [1877] 3 Ex D 338; *Tan Ting Kok v. Cheong Lep Keen & Anor.* [1969] 1 MLJ 153 and *Cheah Teong Tat v. Ho Gee Seng & Ors.* [1975] 2 MLJ 149.

The learned Judge referred to O. 12 which deals with matters concerning appearance. Order 12 r. 1 regulates the mode of entering appearance. Order 12 r. 2 stipulates that the memorandum of appearance must be in specific form. Order 12 r. 3 prescribes the procedure on receipt of the requisite documents. Order 12 r. 3 reads:

> 3.(1) On receiving the requisite documents an officer of the Registry must in all cases affix to the copy of the memorandum of appearance an official stamp showing the date on which he received those documents and enter the appearance in the causebook, and:
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> (a) if the requisite document were handed in at the Registry, hand back that copy of the memorandum; and
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> (b) if they were sent by post, send that copy by post to the plaintiff or, as the case may be, his solicitor at the plaintiff's address for service and also send by post to the defendant or, as the case may be, his solicitor at the defendant's address for service a notice of appearance (stamped with an official stamp showing that date) stating that the defendant specified therein entered an appearance on that date.
>
> (2) Where the defendant enters an appearance by handing in the requisite documents at the Registry, he must on the date on which he enters the appearance send by post to the plaintiff, if the plaintiff sues in person, but otherwise to the plaintiff's solicitor, at the plaintiff's address for service, the copy of the memorandum of appearance handed back to him under para. (1).

The question is whether the judgment in default of appearance is regular or irregular. The answer would depend on whether either of the defendants had entered appearance on 22 June 1989. The learned Judge held that the judgment was entered regularly. Therefore, O. 2 r. 2(1) does not assist the defendants as only the affidavit of Encik Naban was to the effect that the defendants had filed the memorandum of appeal within time. The learned Judge also said the defendants took a fresh step after being aware of the irregularity. The question of liquidated sum was never raised before the Senior Assistant Registrar or the learned Judge. The only point they took was the matter of appearance. The figure of RM14,250,000 was agreed and arrived at by the parties on facts agreed by the parties. Regular judgment should not be set aside except on an affidavit of merits. *Evans v. Bartlam* [1937] AC 473; *Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1986] 1 MLJ 348.

Rule 56 of the Legal Profession (Practice & Etiquette) Rules 1978 provides that:

> 56. Judgment by default. Where the name of the advocate and solicitor or his firm appears on the Court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter judgment by default against the client of the first named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or taking any necessary steps or in complying with any other in the proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and forty-eight hours shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

This is what is known as the 48 hour rule and is binding among the legal practitioners. The plaintiffs said the rule could only apply if there was someone on the other side. They found no appearance had been entered. On the other hand, the defendants maintained that if the rules were not complied with then judgment could not be regular.

The defendants contended that the plaintiffs had also not complied with O. 13 r. 6. It is rare for a plaintiff to sign judgment when appearance has already been entered. Order 13 r. 6 provides:

> 6.(1) Where a writ is indorsed with a claim of a description not mentioned in r. 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered and appearance.

As the appeal is concerned with a question of law there is no need to have evidence. It was submitted that the learned Judge did not conform to the rules. In his judgment he cited a number of cases but the argument was not in *pari materia* with the case concerned. Rule 61 of the Rules of the Supreme Court 1980 does not contain anything like O. 2 r. 2(1) of the Rules of the High Court 1980.

In *Taman Pangkor v. Doric Development Sdn. Bhd. & Ors.* [1987] CLJ (Rep) 1008 Peh Swee Chin J in adopting the reasoning of this Court in *Syarikat Joo Seng & Anor. v. Habib Bank Ltd.* [1986] 2 MLJ 129 when he dealt with O. 13 r. 6(1) stated the position correctly at p. 1009:

> It is clear from O. 13 r. 1 to 6, of the Rules of the High Court that the prayers (1), (2) and (3) of the statement of claim as set out above, were not of the description mentioned in O. 13 r. 1 to 5, but fitted in squarely with O. 13 r. 6(1) so that the plaintiff would be precluded from entering judgment for default of appearance forthwith, and would be, notwithstanding the non-appearance, required to proceed with the action as if the defendant had entered an appearance.
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> In these circumstances, the plaintiff under the present Rules of the High Court, ought to have proceeded further either by summons under O. 81 of the Rules of the High Court (on the ground that the 3rd defendant had no defence), for rescission of the agreement in question as prayed and allied reliefs, or a summons or motion for judgment under O. 19 r. 17, after the expiry of the time for service of defence for default of defence, for such judgment as the plaintiff appeared entitled to on its statement of claim.

Next, it is the submission of the defendants that the irregularity in appearance under O. 12 r. 1(3) is not fatal. *Metroinvest Anstalt & Ors. v. Commercial Union Assurance Co. plc* [1985] 2 All ER 318 was cited.

In *Evans v. Bartlam* it is clearly stated that while the Court of Appeal will normally not interfere except on grounds of law with the exercise of the Judge's discretion, if it is seen that on other grounds his decision would result in injustice being done, the Court of Appeal has both the power and the duty to remedy it. As Lord Atkin pointed out at p. 480:

> ... The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

At p. 9 of the Supplementary Appeal Record the learned Judge pointed out quite rightly that it is the standing practice of the Registry to hand back a copy of the memorandum of appearance at the time it was tendered together with the memorandum of appearance. The question is whether this standing practice was followed in respect of this case. According to the defendants they did not get the stamped copy back on the same day so they could not send it to the plaintiffs on the same day.

At p. 6 of the Supplementary Appeal Record the learned Judge referred to the memorandum of appearance in these words:

> Enclosures 7 and 8 are memorandum of appearances filed by the 3rd and 2nd defendants. The respective memorandum of appearances (encls. 7 and 8) bear the official stamp of the Registry dated 17 and 21 June 1989. These enclosures dated 17 and 21 June 1989 should have been registered before encls. 3, 4, 5 and 6, which were filed on 22 June 1989. It is clearly observed that the memorandum of appearance (encl. 7), besides having the official stamp showing that it was received on 17 June 1989 at 2.00 p.m., also has another stamp as having been received on 27 June 1989 at 9.00 a.m. Whereas encl. 8 bears the official stamp as having been received on 20 June 1989 at 2.00 p.m., also carries another stamped date at the bottom as 27 June 1989. I find encls. 7 and 8 irregular primarily because of the conflicting dates.

He was quite right to say that these enclosures dated 17 and 21 June 1989 should have been registered before encls. 3, 4, 5 and 6 which were filed on 22 June 1989. But why were they not registered on the days of filing and payment in the cause book? Something must be wrong at the Registry. If they were registered in the cause book the plaintiffs could not possibly obtain the certificates of non-appearance to enable them to obtain judgments in default of appearance.

The memorandum of appearance dated 17 June 1989 has the official stamp as having been received on that date at 2.00 p.m. and another stamp as having been received on 27 June 1989 at 9.00 a.m. Similarly, the memorandum of appearance dated 20 June 1989 has the official stamp as having been received on that date at 2.00 p.m. and also another stamp at the bottom as having been received on 27 June 1989. These irregularities can only be answered by the Registry. Whoever was in the charge of the stamp would have to explain the irregularities.

In fact Encik R.R. Chelliah brought these irregularities to our attention. It was pointed out that 17 June 1989 was a Saturday and nothing could be done in the afternoon at 2.00 p.m. Yet, the stamp showed that it was received on that date at that time.

We were very disturbed by all these incidents. Something was clearly wrong in the Registry or someone was careless in the Registry and had not followed standard practice otherwise these incidents could not have occurred in the Registry. In particular, we would like to know why appearances were not entered in the cause book. We would recommend a thorough investigation into these incidents in the hope that similar incidents would not occur in the future.

If the Registry did not comply with the standing practice of handing back the stamped copy of the memorandum of appearance on the same day how would it be possible for the defendants to send it to the plaintiffs on the same day. If the Registry had registered the appearances in the cause book then the plaintiffs would not have been able to obtain the certificates of non-appearance. The learned Judge considered that the defendants should have written to the plaintiffs' solicitors to inform them of the nature of the delay and extending a copy to the High Court Registry. The defendants did their best by sending a copy of the memorandum of appearance which would have put plaintiffs on the alert.

We have taken the trouble to call for and check the principles from the records of the Registry. The numbers on the praecipes were in running series. The prescribed fees were clearly paid on 17 June 1989 and 20 June 1989 and received by the officers of the Registry whose names were clearly recorded on the praecipes. Appearance is a very important process by which a defendant shows his intention to defend and submits himself to the jurisdiction of the Court.

The fact that the defendants were at fault does not necessarily meant that they must be penalised at all cost, particularly when the Registry was, as much, if not more, at blame. The learned Judge should have caused an investigation to be made at the Registry instead of putting all the blame on the defendants. In the light of the irregularities we could not agree with the learned Judge that the judgments were obtained regularly as appearances were clearly entered and should have been registered by the Registry. As we considered that an injustice had been done we ought to remedy. Accordingly, we allowed the appeal with costs both here and the Court below. We set aside the judgment of the learned Judge and restored the order made by the Senior Assistant Registrar. We also ordered the case be heard by another Judge.

Also found at [1990] 1 CLJ 1096